

**COURT OF APPEAL
CIVIL**

CoA Record No. 2015 348

JUDICIAL REVIEW

Between:

ALI CHARAF DAMACHE

Applicant/Respondent

and

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
IRELAND and
THE ATTORNEY GENERAL**

Respondents/Appellants

and

THE MINISTER FOR JUSTICE AND EQUALITY

Notice Party

and

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

OUTLINE SUBMISSIONS OF THE AMICUS CURIAE

Introduction

1. The background to this appeal has been set out in the written submissions filed on behalf of the Appellants and the Applicant/Respondent ('the Applicant'), and accordingly it is not proposed to refer in detail here to the facts and procedures except insofar as is necessary. As the appeal in these joined judicial review proceedings is being brought by the Director of Public Prosecutions, the Appellants are hereafter referred to as 'the DPP'.
2. The Irish Human Rights and Equality Commission was joined as *amicus curiae* to the related extradition proceedings by Order of Edwards J. dated 14th October 2014. As noted by the High Court (Donnelly J.) at paragraph 5.1.1 of its judgment

of 21st May 2015 herein¹ the Order joining the Commission as *amicus* was made with the consent of the parties, as was the Order of 25th November 2014 joining the Commission as *amicus* in the within judicial review proceedings. The application to join as *amicus* was brought by the Commission by way of Notice of Motion and grounding Affidavit, in which reference was made to the Commission's statutory role under s.10(2)(e) of the *Irish Human Rights and Equality Commission Act 2014*².

3. The written and oral submissions of the *amicus* in these judicial review proceedings before the High Court focused on the question of whether the DPP is under an obligation to give reasons for a decision not to prosecute or, alternatively, to provide a justification for not giving such reasons. This general issue was ultimately not decided by Donnelly J., as she found that there were specific grounds (relating to the issue of forum) for quashing the DPP's decision of 28th January 2014 DPP refusing to reconsider the DPP's earlier decision of 16th March 2011 decision not to prosecute the Applicant. The *amicus* had made written and oral submissions in relation to the issue of forum, as had the Applicant and the DPP. Donnelly J. found as follows at paragraph 12.8.17 of her decision:

"...it is clear that this is a situation where the DPP abdicated her function to consider forum (albeit unwittingly), or acted under an improper policy (the policy being that forum will not be considered). The matter is therefore reviewable within the well settled parameters of review of DPP decisions."

4. The more general question of whether the DPP must give reasons for a decision not to prosecute was subsequently determined by this Honourable Court in

1 *AG v. Damache & Damache v. DPP* [2015] IEHC 339, accessible at <http://courts.ie/Judgments.nsf/0/3E2641854BA1DDC380257E580045EA0D>

2 Section 10(2)(e) of the 2014 Act provides that one of the functions of the Commission is "to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as *amicus curiae* in proceedings before that court that involve or are concerned with the human rights or equality rights of any person and to appear as such an *amicus curiae* on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion)". Section 10(2)(e) had at the time the Commission joined the judicial review proceedings been recently commenced, on the 1st November 2014. At the time of joining the extradition proceedings, the similar provisions of s.8(h) of the *Human Rights Commission Act 2000* were in force.

Marques v. DPP³, with Peart J. giving judgment for the Court and finding as follows at paragraph 23:

“The decision not to prosecute the appellant affects no recognised right in law. In my view it follows that he has no free-standing right to be given the reasons for the decision not to prosecute. The right to reasons must relate back to the type of decision under scrutiny and to some right actually engaged. If he has no right even to request what he is requesting, he has no right to reasons why his request is refused.”

5. Accordingly, the question of whether the DPP must in general give reasons for a decision not to prosecute does not appear to be a live issue in the present appeal, and the *amicus* notes that the Applicant is not proceeding with his cross-appeal in relation to this issue.
6. The remaining issues which the *amicus* seeks to address in these submissions are the following:

- (a) If it is the DPP’s policy that she is not obliged to consider forum when deciding whether to prosecute a person who could potentially be prosecuted in another jurisdiction for the same alleged conduct, is this an improper policy?

The *amicus*’ use of the phrase “*consider forum*” in this context is intended to be a reference to the inclusion by the DPP in her list of considerations of the possibility of the Applicant being prosecuted in another jurisdiction in respect of the same alleged conduct, if a decision not to prosecute is taken in this jurisdiction.

In summary, the *amicus* submits that the fact that extradition is a possibility should not be excluded from the DPP’s consideration on whether to prosecute, given the effect that any extradition and prosecution in another jurisdiction may have on a person’s fundamental human rights such as the physical and mental integrity of

3 [2016] IECA 373, accessible at <http://courts.ie/Judgments.nsf/0/5FAFF06965DFD3ED8025808F004038B8>

the suspect, such as were held to exist by Donnelly J. in the Applicant's case (the issue of prolonged solitary confinement).

The relevance of a person's fundamental human rights in respect of forum is illustrated in the judgment of the High Court of England and Wales, handed down yesterday (5th February 2018) in *Love v. The Government of the United States of America*, [2018] EWHC 172 (Admin), in which the Lord Chief Justice and Ouseley J. in a joint judgment allowed the Mr. Love's appeal against his extradition to the U.S.

- (b) At what stage of the DPP's decision-making process do the obligations set out in s.6(9) of the *Criminal Justice (Terrorist Offences) Act 2005* become applicable?

In summary, the *amicus*' position is that they apply from the outset of the DPP's consideration of whether to bring a prosecution.

7. A number of the DPP's grounds of appeal relate to procedural matters (such as the appropriate form of the final Order, and whether Donnelly J. should have reconvened the hearing in the High Court to allow for oral submissions in relation to s.6(9) of the 2005 Act) and factual matters (such as whether Donnelly J. had sufficient evidence that a prosecution could potentially take place in Sweden?) in respect of which the *amicus*'s respectful position, subject to the Court, is that it is inappropriate for it to make submissions.

The DPP's policy on "forum"

8. At paragraphs 11.39 to 11.42 of her judgment in *AG v. Marques & Marques v. DPP*⁴, Donnelly J. recorded the following discussion she had had with Counsel for the DPP during the hearing in that case. It is perhaps worth setting out at length, given that it appears to show the DPP's policy on consideration of forum, and

4 [2015] IEHC 798, accessible at <http://courts.ie/Judgments.nsf/0/A0B479085D26D79B80257F330039C945>

does not appear to have been departed from in the DPP's submissions in the present appeal⁵:

“11.39 An issue arose during the submissions of counsel for the State as to the DPP's role in forum considerations. At the outset, it must be recognised that the word “forum” can mean different things. Forum can be understood as a jurisdictional requirement to consider the possibility of prosecution in another jurisdiction. This type of jurisdictional requirement to consider forum formed the basis for the decision of this Court in Damache concerning, as it did, the implementing legislation relating to the Framework Decision on Combating Terrorism.

11.40 Counsel for the State submitted that, rather than a jurisdictional issue, forum considerations arise in the context of the public interest concerns such as the personal circumstances on an individual but could also go to inform the decision of the DPP in relation to the availability or the ready availability of evidence. Counsel for Mr. Marques raised an issue that the DPP seemed to be suggesting that, although she could consider forum, she had no duty to do so

11.41 Counsel for the DPP raised the issue again on the following day. Counsel clarified that the DPP's duties were to be found under the Prosecution of Offences Act 1974 i.e. whether to prosecute or not. Reliance was placed upon the dicta of Edwards J in Marques (No. 1) which reiterated the foregoing and stated, at para. [23]:

“It remains the case that the relevant criteria to which she must have regard are (i) the availability and sufficiency of relevant evidence, and (ii) the public interest in prosecuting the case in this jurisdiction. Clearly, however, what are sometimes referred to as ‘forum issues’ might now have a bearing upon the public interest consideration in a particular case.”

5 Although the DPP at paragraph 34 of her submissions states that there is no legal obligation on her to consider forum in the fashion contended for by the Respondent, there does not appear to be a submission as to whether there is an obligation to consider forum to any degree.

11.42 During further discussion between the Court and counsel for the State, the Court queried whether the DPP had no role in taking into account the fact that it may be more convenient to prosecute somebody in another country i.e. does the public interest allow her to consider whether it might be more convenient to prosecute elsewhere. In reply, counsel for the State said that the DPP could go no further; the position regarding the DPP's duties is set out in case law. The DPP had a duty to prosecute if there was sufficient and reliable evidence and if it was in the public interest to do so. In considering what was in the public interest, a wide range of factors must be taken into account. The factors are illustrated in the Guidelines but not exclusively or presumptively so. He pointed, by way of example, to the decision of Edwards J in Damache (No. 1) and to the very wide variety of matters that might be said to be in the public interest."

9. Accordingly, it appears that the DPP's policy is that the issue of forum may be considered insofar as it affects the public interest, but at the same time, there is no obligation to consider the issue of forum (presumably even where an extradition request in relation to the same alleged offending conduct has been made or is anticipated). Section 4.22(d) of the DPP's *Guidelines for Prosecutors*⁶ provides that one factor "*which may arise when considering whether the public interest requires a prosecution*" is "*whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender*". Although this is phrased in terms of an optional consideration, given its nature, consideration of whether prosecution would be disproportionately harsh or oppressive should, it is submitted, be viewed as an obligation, particularly given the DPP's duty to make a decision that is reasonable and proportionate⁷ and to perform her functions in a manner compatible with the State's obligations under the European Convention on Human Rights⁸.

6 Although these guidelines were updated in October 2016, Section 4.22(d) remains unchanged from the 2010 Guidelines which were current at the time the decisions impugned in this case were taken. Accessible at [https://www.dppireland.ie/filestore/documents/Guidelines_for_Prosecutors_\[4th_Edition_-_October_2016\].pdf](https://www.dppireland.ie/filestore/documents/Guidelines_for_Prosecutors_[4th_Edition_-_October_2016].pdf)

7 See for example *Meadows v. MJELR* [2010] 2 IR 701, accessible at <https://library.justis.com/document.aspx?doc=e7jsrUrxA0LxsKjIo5adn4ytoZWlIvLerIOJij1iYatmWmInXmImJCdmXicIIOuDYl2CKL2y0L2BULezIOdm9baa&relpos=1>

8 See s.3 of the *European Convention on Human Rights Act 2003*, and the related obligations under Article 8 of the ECHR.

10. It is respectfully submitted that, if the DPP is obliged to assess the risk of a disproportionately harsh or oppressive outcome arising from a decision not to prosecute, then she cannot do so without examining the entire factual matrix. If, for instance, the existence of an extradition request was to be excluded as a relevant consideration, then the DPP's assessment of whether there is a risk of a disproportionately harsh or oppressive outcome would be incomplete.
11. The *amicus* is therefore of the view that, because the possibility of the Respondent being extradited to the United States was a consequence of the decision not to prosecute him, it was a relevant consideration for the DPP in coming to that decision.⁹ The weight to be given to that consideration is of course a matter for the DPP and the scope for judicial review of any balancing exercise of competing considerations carried out by the DPP may be narrow. Indeed, as the DPP is not required to provide reasons for a decision not to prosecute in all but the most exceptional circumstances¹⁰, it may be that the affected persons and the courts will in most cases never learn whether the possibility of extradition and prosecution abroad for the same alleged conduct was included as a consideration. Nonetheless, it is submitted that it would be appropriate for the Court to find as a matter of law that there is an *obligation* on the DPP to include the possibility of extradition and prosecution abroad for the same alleged conduct as a consideration, and that this factor, where it arises, must be taken into consideration.
12. In any case where it arises, it would seem arbitrary to specifically exclude the possibility of extradition abroad as a consideration. From the point of view of the public interest in the prosecution of offending behaviour, an existing extradition request or the likelihood of one being made must be relevant to the DPP's consideration as to whether to prosecute – if there is, or is likely to be, an extradition request, then a decision of the DPP not to prosecute does not mean that the person will never be prosecuted in respect of the alleged conduct (as would normally be the case), because he or she may be prosecuted in another

⁹ Or more accurately, in coming to the decision not to revisit the earlier decision not to prosecute.

¹⁰ See *AG v. Marques & Marques v. DPP* [2015] IEHC 798, accessible at <http://courts.ie/Judgments.nsf/0/A0B479085D26D79B80257F330039C945>

jurisdiction. If, on the other hand, there is no extradition request and it seems unlikely that one will be made, then the decision not to prosecute means that it is likely that the person will never be prosecuted in respect of the alleged conduct.

13. As matters stand, it is already the DPP's position that "the public interest" not only involves a range of actors, such as victims, accused persons, and witnesses, but is of importance to society as a whole. Paragraph 1.1 of the DPP's *Guidelines for Prosecutors* provides:

"1.1 Fair and effective prosecution is essential to a properly functioning criminal justice system and to the maintenance of law and order. The individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to prosecute and for what offence, and in the outcome of the prosecution." (Emphasis added)

14. It is uncontroversial that persons charged with criminal conduct should face trial and that the existence of arrangements for extradition are in the public interest – see, for example, the comments of O'Donnell J. at paragraph 4 of his judgment in *Minister for Justice and Equality v. JAT (No.2)*¹¹ where he stated:

"...considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. There is a constant and weighty interest in surrender under an EAW and extradition under a bilateral or multilateral treaty."

15. If it is the case that the DPP's policy is that she is not obliged to take the possibility of extradition and prosecution abroad into consideration in every case where it arises, it is submitted that this would be an improper policy. Donnelly J. referred to the relevant test for reviewability at paragraph 11.50 of her High Court decision in *Marques*¹², which was upheld on appeal by this Honourable Court:

11 [2016] IESC 17, accessible at <http://courts.ie/Judgments.nsf/0/C352CEDA51803C4F80257FA3004F0A3C>

12 [2015] IEHC 798, accessible at <http://courts.ie/Judgments.nsf/0/A0B479085D26D79B80257F330039C945>

“11.50 It must be acknowledged that a decision of the DPP is reviewable. That has been confirmed time and again by the Superior Courts; however, due to the special position of the DPP, the nature of that review is limited. As set out at para. [11.16] above, O’Donnell J. held that a decision of the DPP is reviewable “if it can be demonstrated that it was reached mala fides or influenced by improper motive or improper policy, or other exceptional circumstances.” O’Donnell J. acknowledged that, as so qualified, The State (McCormack) has remained the law.”

When does s.6(9) of the 2005 Act become applicable?

16. The DPP submits at paragraph 36(c) of her submissions in this appeal that Donnelly J. should have considered the argument that the obligations on the DPP provided for by s.6(9) of the 2005 Act only arise after the DPP has made a decision to prosecute. It would appear that this would involve a three-stage process in cases with an EU transnational terrorist element, whereby the DPP first makes a decision to prosecute without considering the issue of forum (that is, forum in the specific context of the 2002 Framework Decision on Combating Terrorism¹³ and s.6(9) of the 2005 Act), and then moves on to engage with the authorities of another Member State as regards which is the most appropriate jurisdiction for the prosecution, before revisiting the original decision to prosecute to determine whether it should still stand, in light of what has been established through the co-operation procedure.

17. It is submitted that the more straightforward view would be that the forum mechanisms and considerations of s.6(9) of the 2005 Act are mandatory in every case in which relevant offending behaviour arises, and that it applies to a consideration on *whether* to prosecute. It seems unrealistic to view it as applying only where the outcome of the consideration is to prosecute, as the consideration has already taken place at that stage. Accordingly, the provision would appear to

13 This Framework Decision has now been replaced by Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, which is accessible at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32017L0541>

apply to considerations which ultimately have as their outcome a decision not to prosecute.

18. Section 6(9) serves as a statutory example of a mandatory forum consideration. However, as discussed above, the *amicus* respectfully submits that forum should be considered in every case where there is an extradition request or where one is anticipated.

Conclusion

19. For the reasons given above, the *amicus* is of the respectful view that, in deciding whether to prosecute, the DPP should consider issues of forum in every case where there is an extradition request in respect of the same alleged conduct, or such a request is anticipated.
20. The *amicus* further submits that Donnelly J. was correct to find that s.6(9) of the *Criminal Justice Act 2005* imposes a specific obligation on the DPP to consider the issue of forum in cases where it applies, at the time the consideration on whether to prosecute is being made.

Anthony Hanrahan B.L.
Michael Lynn S.C.

6th February 2018

On behalf of the Irish Human Rights and Equality
Commission, acting as Amicus Curiae

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